NO. 351599

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NORMA ACOSTA and GILBERT ACOSTA,

Appellants,

vs.

CITY OF MABTON,

Respondent.

BRIEF OF RESPONDENT CITY OF MABTON

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Officials from the City of Mabton responded promptly to a report from Norma Acosta of sewage in the basement of her home. The City dispatched a crew to assess the nearby sewer lines. After several hours of work, the City crew determined that a sewer line serving the Acosta property was clogged. As the line was being cleared by City equipment, the City's crew observed objects emerge from the clogged line. These objects consisted of a partially inflated child's ball, a cell phone, and grease. When these items were intercepted and removed from the sewer line, flow returned to normal.

After a period of discovery, the City moved for summary judgment. The City argued that it was not liable for the vandalism caused by third parties inserting a ball into the sewer line. The City argued that the Acostas could not show that the City was negligent with respect to the blockage. The City also argued that the Acostas' negligence theories failed due to the absence of any evidence of causation attributable to fault of the City. The trial court agreed with the City. The trial court ruled that the expert witness offered by the Acostas was unable to provide competent opinion testimony in order to carry the Acostas' burden as the non-movants. The trial court dismissed the case.

There are different types of sewer backup occurrences. Sometimes the role of municipal liability is clear. Cases falling into this category include instances where a city's actions in attempting to clear a blockage actually lead to further flooding. City liability may also result where municipal actors caused or permitted an inappropriate connection to a sewer line that resulted in a malfunction of the system.

A plaintiff's burden to show negligence where a sewer line blockage is attributable to foreign objects cannot be met where the only evidence linking the cause of the blockage to a city's actions is speculative. Like roads and streets, cities do not exercise exclusive control over the presence of foreign objects in sewers. But unlike roads and streets, the presence of foreign objects in sewers is unusual and is not readily apparent to observation. A municipality may be without fault even though a homeowner who suffers a flooding event may also be utterly blameless.

The City has never disputed that the intrusion of sewage into the Acotas' basement was unpleasant and distressing to the Acostas. But the rules of summary judgment required the Acostas to come forward with evidence to demonstrate municipal negligence, including with respect to causation. Remarkably, the Acostas offered no declaration of their expert witness in response to the City's motion. The summary judgment

evidence provided by the Acostas' expert on a more-probable-than-not basis was nonresponsive to the City's summary judgment theory. The summary judgment declaration of the City's expert was unchallenged by any competent evidence to the contrary.

This Court should affirm the trial court because the effective administration of justice requires adherence to the summary judgment rules of procedure. Resolution of this case largely comes down to application of the rule requiring a non-movant to meaningfully answer the movant's summary judgment evidence. CR 56(e). When a non-movant fails to do so, regardless of whether the fault is attributable to tactical choices of the litigant or the simple inability to marshal a factual basis to rebut the movant, summary judgment is proper.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

A. When a non-movant offers no new summary judgment evidence in response to the movant's facts demonstrating non-liability, should the court grant summary judgment in favor of the movant?

B. When a non-movant's summary judgment evidence relies on expert opinion about causal explanations for a sewer backup that are based on possibilities, has the non-movant carried its burden?

III. COUNTER-STATEMENT OF THE CASE

A. The backup at the Acosta residence and the City's response.

On the afternoon of January 12, 2015, Mrs. Acosta returned to her home and discovered that sewage water had entered her basement. CP

414-415. She immediately notified the City. CP 415. Two City employees arrived about 35 minutes later. CP 415. The Acosta residence is located at 625 B Street. CP 46. The sewer line under B Street at the time of the incident was an eight-inch concrete pipe. This line leads to a ten-inch concrete pipe under nearby North 6th Street. CP 107-108, 120.

City employees worked to resolve an obstruction in a sewer line serving the Acosta residence from approximately one o'clock in the afternoon until late in the evening. CP 84, 132-133. City officials who reported to the scene and worked on the blockage included Noe Trujillo, Erik Van Doren, Michael Mendoza, and the City's Mayor, Mario Martinez. CP 45, 84, 132-133, 301-302.

City personnel observed water backed up and not flowing at several manholes located along B Street and down to the manhole on North 6th Street and C Street. CP 84. Wastewater flow was observed at the manhole located on North 6th Street and Washington Street. CP 84. This indicated that the blockage was upstream from that location. CP 84. City employees used hydro-jet equipment in an attempt to remove the obstruction. CP 84. This equipment is also sometimes referred to as a "jet-rodder." CP 309. City employees initially hydro-jetted upstream from the manhole on North 6th Street and Washington Street. CP 84. When this proved unsuccessful, they moved to other manholes along

North 6th Street and B Street and hydro-jetted downstream in an attempt to dislodge the obstruction from that direction. CP 84.

The backup was determined to be located in the vicinity of Washington and North 6th Street. CP 85, 133, 312, 347-348. At this location, the sewer line was ten inches in diameter. CP 108.

City staff recovered debris from the blocked line at the manhole located at North 6th Street and Washington Street. CP 108. The debris mainly consisted of a partially inflated ball, a cell phone, and grease. CP 85. These items were observed by Mayor Martinez and wastewater operators Erik Van Doren and Michael Mendoza. CP 85, 133, 348.

The ball was described by the Mayor as the type used in a school physical education class or at recess. CP 85. He likened its size to a child's basketball. CP 85. Mr. Mendoza described it as similar to a kickball or a basketball. CP 348. An elementary school is located just east of North 6th Street on Washington Street. CP 85. The items were covered with grease. CP 348. During his deposition, Mr. Trujillo stated that "I'm pretty sure there has been balls, cell phones and, I mean, there's a lot of stuff you can find in there." CP 303.

Immediately after the ball was removed from the system, wastewater flow through the manhole at North 6th Street and Washington Street resumed. CP 85. No further remedial action was necessary and

attention of City staff turned to making sure that the suddenly increased flow through the system did not overwhelm the wastewater treatment plant. CP 318. In fact, the volume of water rushing toward the plant exceeded the capacity of the plant's pump system, which resulted in a spill at the plant. CP 381. The City reported the spill to the Department of Ecology. CP 381-384.

B. The summary judgment proceedings.

The City moved for summary judgment near the close of discovery on the basis that the Acostas could not establish a prima facie case of negligence. CP 30-39. The City showed how all of the causes of action raised by the Acostas failed in the absence of evidence indicating that the City breached a duty of care owed to the Acostas that was causally connected to the misfortune they suffered.

The City supported its motion with the declarations of eyewitnesses to the backup event, including Mayor Martinez and Erik Van Doren. CP 82-103, 132-133. The City also produced a declaration of an expert witness, William Peacock. CP 104-127.

1. Mr. Peacock's explanation of the mechanism of the blockage.

Mr. Peacock explained the operation of a municipal sewer system in relation to analyzing backup events due to blocked sewer lines. Mr. Peacock has more than 28 years of experience working with wastewater

systems and is the principal engineer in the wastewater management department of the City of Spokane. CP 104. Mr. Peacock holds a certification by the Washington Wastewater Collection Personnel Association, an organization of which he is the past president. CP 105. He has taught wastewater collection courses throughout the State of Washington. CP 105. He has qualified as an expert witness and provided testimony in several lawsuits on matters relating to municipal wastewater systems. CP 105.

Mr. Peacock stated that a municipality cannot control the entry of foreign objects into the sewer system. CP 105. In his 28-year career, Mr. Peacock has overseen the removal of a bowling ball, shovel, garden hose, 5-gallon bucket, and other inappropriate objects from wastewater systems. CP 105.

In providing his opinion, Mr. Peacock first considered the adequacy of the City's overall wastewater infrastructure. CP 107. He concluded that the sewer lines adjacent to the Acosta residence, under both B Street and North 6th Street, "are more than adequate to handle existing wastewater flows." CP 107. He also investigated the condition of the sewer line in which the obstruction was found. CP 108. Mr. Peacock determined that there was no defect or problem with the line that could cause or contribute to the backup. CP 108.

Mr. Peacock considered the manner in which a ball would behave within a municipal sewer line. CP 108. He purchased a four-square type ball from a local sporting goods store. CP 108. The ball measured 8.5 inches in diameter. CP 108. He modeled it within a 10-inch sewer line of the type found under North 6th Street. CP 108.

Mr. Peacock explained in his declaration that no sewer line pipes are perfectly clean. CP 109. The actual diameter of a 10-inch line in operation would be less than the nominal diameter. CP 109. Even in a well-maintained system, a sewer line will accumulate debris such as organic and inorganic matters including grease and sediments. CP 109. Further, a sewer line carries wastewater. At the time of his site visit, Mr. Peacock observed two to three inches of water in the line under North 6th Street. CP 107-109.

As a result of these factors, the introduction of an 8.5-inch ball into a 10 inch sewer line would cause a restriction in flow. CP 109. The ball could be likened to a sieve, allowing water to flow around the ball, but also accumulating debris as a result of the ball's interference with ordinary flow velocity. CP 109. This effect would exacerbate itself because decreased flow velocities would increase the tendency for further debris to lodge and not continue down the line. CP 109. According to Mr. Peacock "these circumstances will cause a major backup." CP 109.

Mr. Peacock's explanation of the relationship of the ball in causing the blockage also explained the prevalence of grease that accumulated at the point of the blockage. CP 109. Grease was a result of the flow restriction because the blockage created an opportunity for the emulsified grease to coagulate during the cold weather experienced at the time of this incident. CP 109-110. The accumulation of grease alone would cause a gradual restriction in wastewater flow but not the sudden and substantial blockage experienced by the Acostas. CP 110. In the words of Mr. Peacock "without the introduction of a foreign object into the system, here a ball, the type of blockage described by the Acostas and City employees would not have occurred." CP 110. Mr. Peacock stated that "without the ball, there would have been no backup." CP 111. He stated that "it is my professional opinion to a reasonable degree of engineering certainty that no conduct by the City of Mabton caused or contributed to the backup." CP 111.

The Acostas never deposed Mr. Peacock.

2. The Acostas' evidence on summary judgment.

In response to the City's motion for summary judgment, the Acostas offered the declaration of Norma Acosta. CP 414-417. Ms. Acosta had no personal knowledge of the cause of the backup. The Acostas also offered deposition testimony of various City employees

including Derek Nash, Noe Trujillo, and Michael Mendoza. CP 155. Nothing from Mr. Nash provides any evidence regarding the occurrence of the blockage at the Acosta residence. CP 279-287.

Mr. Trujillo was unable to recall whether he had seen a ball and cell phone plugging the line. CP 303. Mr. Trujillo stated that he did not know what was plugging the line. CP 302. When questioned further, he stated that: "You know, I mean, a lot of things go down towards the sewer plant but, I mean, I really couldn't say what caused it. There is times that grease or so, I know we did pull out grease." CP 303.

Mr. Mendoza observed the ball and the cell phone laden with grease at the Washington and North 6th Street manhole. CP 347-348. Mr. Mendoza provided no testimony regarding the relation of the ball, the presence of grease, and the ensuing backup. In response to questioning of the Acostas' counsel positing that the ball may not have been the cause of the blockage, Mr. Mendoza testified that "I couldn't answer that." CP 377.

The Acostas' only source of expert opinion testimony on issues of negligence and causation was a report of an industrial hygienist, Susan Evans, together with excerpts from Ms. Evans' deposition. CP 195-219, 221-276. These items predated -- and thus did not respond to -- the declaration of Mr. Peacock. CP 104-127, 195-219, 221-276.

a. Ms. Evans' report.

Ms. Evans prepared a report in this case dated November 5, 2015, that was identified as a "damage assessment." CP 160-191. Ms. Evans described the presence of contamination in the Acosta residence. CP 161-162. She provided background information on types of contamination related to sewage intrusion. CP 163-165.

She offered the opinion that the Acosta residence had not been fully remediated and expressed views on defective remediation work performed by ServiceMaster. CP 167, 169. The City amended its answer to identify ServiceMaster as a nonparty at fault. CP 22. Ms. Evans' report of November 5, 2015, offered no opinion on the question of municipal negligence.

In a later report dated November 10, 2016, Ms. Evans acknowledged that her earlier report did "not include content other than general work practices for cleaning different types of furnishings and surfaces." CP 197. In her second report, Ms. Evans offered opinions on a more-probable-than-not basis relating to the conduct of the City. CP 203.

Ms. Evans reached five conclusions. First, Ms. Evans stated that the City failed to take corrective measures prior to the occurrence of the Acosta backup, which she contended "may have" included installing backflow preventers at private residences. CP 203. Second, Ms. Evans

contended that the City "should have considered upgrades to the sewer lines adjacent to the Acosta residence." CP 203. Third, Ms. Evans stated that the City should have required grease traps and taken steps to limit grease discharges to the sewer system.[1] CP 203. Fourth, Ms. Evans stated that the City "should have been performing elevated cleaning and inspection in areas of elevated risk and known backups including the sewer line in front of the Acosta residence." CP 203. Finally, Ms. Evans stated her view that it was "implausible" that an 8-inch diameter inflatable ball was visible in certain photographs. CP 203.

b. The deposition testimony of Ms. Evans.

Ms. Evans' deposition was conducted by the City on January 4, 2017. At her deposition, Ms. Evans acknowledged that her work as an industrial hygienist would relate to analysis of circumstances after a blockage event had already occurred. CP 241. She agreed that her work as an engineer involving sewer blockages was limited to a single instance. CP 242. In this prior engagement, a Seattle apartment complex suffered a backup in its private service lines after an expansion of the apartment complex overloaded the existing lines. CP 64-65.

[1] Ms. Evans did not acknowledge that the City has an ordinance prohibiting the discharge of foreign material into the system and another ordinance that specifically prohibits "fats, gas, grease or oils." CP 83, 89. Ms. Evans did not acknowledge that the City requires grease traps. CP 83-84.

Ms. Evans has never consulted with a municipality regarding the standard of care for sewer system cleaning. CP 767. She was unfamiliar with any of the formulas used to calculate sewer line capacities. CP 768-769. She has participated in no training that was focused on municipal wastewater or sewer systems. CP 771. The project experience listed by Ms. Evans in her CV does not include any work related to municipal wastewater or sewer systems. CP 773. Prior to this case, she has never been engaged to provide testimony in any other matter relating to a sewer blockage. CP 759.

When Ms. Evans was directly asked what caused the backup she stated: "Well, at the very least, it was grease." CP 257. In addition, however, she acknowledged that "there [were] quite a number of factors." CP 257. She then proceeded to identify factors such as the sizing and design of the sewer and stated that "oftentimes, it is not one event but a series of contributing factors." CP 258-259. Ms. Evans testified that if the relevant sewer line had been 20 inches in diameter rather than eight inches in diameter then the clog would not have occurred. CP 259. She identified that another contributing factor was the presence of 90-degree bends in the sewer line system downstream from the Acosta residence. CP 260. She identified as an additional factor "the lack of jetting on a regular basis on the lines . . . ." CP 260. She stated that "subtle nuances"

to the foregoing also played a role. CP 260. The "nuances" included her contention that the capacity of the City's sewer system was at or near its limits and that there had been a history of backups in the line. CP 260-261.

When asked to identify among the myriad of factors how any one of which would have been sufficient to cause the backup, Ms. Evans answered as follows:

Q: Okay. Were any of those items that you've articulated, the grease, the sizing and design of the sewer line including the diameter, the presence of the downstream connections, the lack of jetting, the capacity of the system, the history of backups, were any of these factors sufficient in and of themselves? That is to say, independent of the other factors, to cause the backup?

A: I'm not sure that I could state it that way.

CP 261.

Ms. Evans pointed to the lack of regular maintenance as increasing "the likelihood that things were going to backup." CP 261. She did not state a causal opinion on the role of regular jetting in relation to this backup.

Q: Do you know whether regular jetting of the lines would have prevented this backup?

A: I know that it is part of the civil engineering recommendations of how – standards and guidelines of how systems are supposed to be maintained, you know, and those are based on what are the good practices of keeping the risks low relative to having backups occur.

CP 262.

Ms. Evans found it "implausible" that a ball was involved in the backup and ruled out any role of the ball in causing the backup because she deemed the eyewitnesses to the ball to lack credibility. CP 267. Ms. Evans agreed that nothing that the City could have done would guarantee that foreign could not be introduced into the system. CP 272. She acknowledged that "[t]hings accidentally fall in or are, on purpose, put in." CP 272.

None of the deposition testimony of Ms. Evans was offered on a more-probable-than-not basis. The only evidence before the trial court on this basis came from Ms. Evans' report of November 10, 2016. CP 203.

c. Ms. Evans' opinions in relation to the declaration of Mr. Peacock.

Mr. Peacock's declaration was dated January 23, 2017. CP 115. Thus, Mr. Peacock's declaration incorporated and responded to both Ms. Evans' report and her deposition testimony.

Mr. Peacock used relevant engineering calculations to determine that the "sewer lines near the Acosta residence, under both B Street and North 6th Street, are more than adequate to handle existing wastewater flows. In fact, they are adequate to convey the peak wastewater flow projected for 2031." CP 107. He found the absence of any defect or problem with the sewer line under North 6th Street that could cause or contribute to a sewer backup. CP 108.

He explained how the ball would have behaved within the sewer line to cause the backup on a basis preceding -- and independent of -- the accumulation of grease. CP 109-110. Mr. Peacock explained that the accumulation of grease "was a product of the blockage rather than a cause of the blockage." CP 110. He distinguished the type of blockage experienced by the Acostas (a sudden and substantial event) from the slow restriction in flow rates associated with the accumulation of grease. CP 110. He identified the causal significance of the ball as follows: "Without the introduction of a foreign object into the system, here a ball, the type of blockage described by the Acosta and City employees would not have occurred." CP 110. He reiterated that "without the ball there would have been no backup." CP 111.

With respect to maintenance activities of the City, Mr. Peacock testified in his declaration as follows:

> No reasonable program of maintenance of the City's sewer lines could have anticipated or prevented the obstruction and backup in this case. Even weekly hydro-jetting of the entire system – which is a practice unheard of for any municipality of which I am aware – would have been insufficient to detect and resolve this blockage prior to the backup and flooding that occurred.

CP 111.

Mr. Peacock's declaration observed that Ms. Evans was incorrect regarding the existence of 90-degree bends in a sewer junction downstream from the Acosta residence. CP 112. Mr. Peacock pointed out

that the junction was in fact upstream of the blockage. CP 112. He also stated that nothing about the junction "departs from ordinary design standards" because the junction was engineered in accordance with standard practices in the field of wastewater design. CP 112.

He refuted Ms. Evans' contention that a 20-inch line was necessary to meet the standard of care. CP 113. There is no duty for a municipality to install "a municipal sewer system larger than hydraulically necessary to carry anticipated wastewater flows." CP 113. He found it "ridiculous" to suggest that the size of a sewer line should be based on the prospect of accommodating "speculative foreign matter that may be improperly deposited into the system." CP 113.

Mr. Peacock responded to Ms. Evans' claim that municipalities should clean 29.9% of their municipal sewer system each year. CP 114. Mr. Peacock observed that the study relied upon by Ms. Evans as support for her view "does not establish a standard of care relating to sewer system maintenance" but instead was a summary of responses to a survey issued by the American Society of Civil Engineers in 1998. CP 114. Mr. Peacock pointed out that the 29.9% figure was an average of the cities responding to the survey. CP 114. He stated that "[i]t does not represent an industry best practice, standard of care, or duty." CP 114. He stated as follows:

> It is erroneous and unsupported by any professional literature or recognized industry standard to suggest a duty of care tied to numerical rate of frequency at which a sewer system is hydro-jetted without considering other factors of a particular system.

CP 115.

Mr. Peacock stated that no municipality of which he was aware cleans its entire system two times per year. CP 114. With respect to the role of sewer system cleaning in relation to the standard of care, Mr. Peacock stated as follows: "It has been my experience that many cities try to clean their sewer systems in three to five year cycles, but there is no industry standard or duty associated with any particular rate of cleaning." CP 114.

The summary judgment materials of the Acostas included nothing in response to the declaration of Mr. Peacock. No declaration of Ms. Evans was ever submitted.

3. The motion to strike.

Instead of producing any new summary judgment evidence, the Acostas relied upon the reports of Ms. Evans and her deposition. CP 154-155. The City moved to strike the opinions of Ms. Evans. CP 728-729.

The City argued that the reports of Ms. Evans were not affidavits, declarations, or other sworn statements competent as summary judgment evidence under CR 56(e). CP 737-739. The City argued that Ms. Evans'

expert opinion was not competent because she has no knowledge of the field of municipal wastewater operations and formed her opinions based on speculation without application of any technical or methodological basis. CP 742-747. The City pointed out that the crux of Ms. Evans' opinion was a reiteration of the deposition testimony of former City employee Noe Trujillo and an unprincipled disregard of the testimony of witnesses who observed the ball in the sewer system. CP 745-747.

In response to the City's motion to strike, the Acostas still introduced no new summary judgment evidence. CP 786-799. The Acostas primarily argued that the City's motion to strike was untimely and that Ms. Evans' reports were proper because they were attached to the declaration of counsel. CP 791-795.

4. The trial court's summary judgment decision.

The trial court first took up the issue of the City's motion to strike. RP 2-3. The court denied the City's motion. RP 23-24. The trial court stated that Ms. Evans, as a civil engineer, was qualified to testify at trial and that any further criticism of her background would be an issue of weight, rather than admissibility. CP 815.

Nevertheless, the trial court found that Ms. Evans' analysis was "rhetorical and not specific." CP 815. The trial court observed that her statements of opinion "are all made conditionally" and that she failed to

"complete her analysis by offering an opinion as to the cause." CP 815. The trial court stated that "posing reasonable rhetorical questions is not an expert opinion that can be relied on." CP 815. On this basis, the case was dismissed. CP 812-815.

IV. ARGUMENT

A. Standard of review.

Review of summary judgment orders is de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

B. The Acostas failed to meet their burden as the non-movants on summary judgment.

The rules of summary judgment contemplate a burden-shifting approach to determine whether a non-movant can offer some "competent evidence that could be presented at trial showing that there is a genuine dispute as to a material fact." 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2727.2 (2017). "The responding party must submit additional supporting materials demonstrating the existence of a material issue of fact, or risk the entry of a summary judgment." 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 25:6 (2016).

The peril to a non-movant in failing to introduce summary judgment material responsive to that of the movant is clear. When a

movant's summary judgment evidence is "properly made and is uncontradicted, it may be taken as true for purposes of passing upon the motion for summary judgment." *Leland v. Frogge*, 71 Wn.2d 197, 200, 427 P.2d 724 (1967). A summary judgment proceeding is not an academic exercise, nor is it a dry run of the prospective trial briefs of the parties. The burden-shifting purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). An adverse party is required to "set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Failing to do so, an adverse party properly may have summary judgment entered against him or her. CR 56(e).

The burden on a non-movant is not high and the non-movant is entitled to have the evidence viewed in a light most favorable to his or her position. Nevertheless, a deficient presentation of summary judgment evidence by a non-movant cannot be saved by the lenient standards of CR 56. If a plaintiff, as the nonmoving party, "can offer only a 'scintilla' of evidence, evidence that is 'merely colorable' or evidence that 'is not significantly probative,' the plaintiff will not defeat

the motion." *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007) (quoting *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987)). Put somewhat differently, "[t]he party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seiber*, 136 Wn. App. at 736.

In the present case, the trial court properly focused its inquiry on the Acostas as the party with the burden of proof at trial. *Citizens Alliance for Prop. Rights Legal Fund v. San Juan County*, 181 Wn. App. 538, 543, 326 P.3d 730 (2014).

The Acostas rested their summary judgment presentation on material compiled prior to the declaration of Mr. Peacock. Mr. Peacock's declaration engaged the claims of Ms. Evans and demonstrated why her positions were spurious. He did this partly by showing that she was in error on her foundational assumptions and partly by showing the existence of analytical gaps in her testimony. CP 111-115. By choosing to supply nothing in response to Mr. Peacock, the Acostas did not meet the non-movant's burden. Speculation and argumentative assertions that unresolved factual issues remain have never been sufficient to establish

the existence of a genuine issue of material fact at summary judgment. *Seven Gables Corp*., 106 Wn.2d at 13.

The burden-shifting scheme of summary judgment requires the non-movant to meaningfully engage with the movant's summary judgment evidence. This is essential where the movant has demonstrated the absence of a prima facie case on any essential element. The liberal construal of facts most favorably to the non-movant is of little benefit if the non-movant does not respond to the evidence raised by the movant. The Acostas' failure to rebut anything in the declaration of Mr. Peacock constitutes a sufficient basis to affirm the trial court. *See Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (non-moving party must rebut the moving party's contentions).

C. The opinions of Ms. Evans, by failing to respond to the declaration of Mr. Peacock, failed to establish the existence of an issue of material fact on essential elements of negligence.

As will be shown in section IV(E) below, the trial court erred in failing to strike the opinions of Ms. Evans. Ms. Evans lacks the necessary qualifications to provide the opinions she offered. She also failed to apply any recognized methodology in delivering her analysis.

But these issues are different from the present question of whether the trial court properly applied CR 56(e). The Acostas' case was dismissed because the opinions of Ms. Evans provided no basis to

conclude that the City was negligent in any manner proximately causing the harm suffered by the Acostas. In this section, the City will show how the analytical gaps of Ms. Evans were exposed by Mr. Peacock's declaration. The Acostas' summary judgment presentation fell victim to sloppy reasoning, unsubstantiated assumptions, and incorrect foundational facts.

1. Essential elements of negligence.

The Acostas' theories of liability against the City all sound in negligence.[2] Negligence required the Acostas to prove the existence of a duty, a breach of that duty, and injury proximately caused by the breach. *Simmons v. City of Othello*, No. 34343-0-III, 2017 WL 2778190 *5 (Wn. App. 2017).

A municipality has a duty to exercise reasonable care in the repair and maintenance of its sewage system. *Kempter v. City of Soap Lake*, 132 Wn. App. 155, 158, 130 P.3d 420 (2006). A negligence claim in this context requires the same showing as any other negligence case. There is no strict liability for municipal sewer backups. The Acostas have never claimed that negligence could be based on res ipsa loquitur.

[2] The Acostas identified four separate causes of action. CP 5-7. The first, second, and fourth causes of action are directly based on a theory of municipal negligence. The third cause of action, private nuisance, is either tantamount to a negligence claim or requires a heightened showing of intentional conduct. *See Owens v. City of Seattle*, 49 Wn.2d 187, 194, 299 P.2d 560 (1956). Because the Acostas have neither alleged nor produced evidence of intentional conduct by the City, their nuisance claim must be subsumed by their negligence theories.

Inappropriate objects may be, and occasionally are, forced into public sewer systems. Public access to the sewer lines leads to the possibility of obstructions that have nothing to do with a defect in design or construction of the system itself. These obstructions occur regardless of routine maintenance.

The Acostas' opening brief suggests a theme of strict liability against the City, but this is not the law. It is undoubtedly true that property owners are required to connect to the sewer system despite having little or no control over its operation. Br. at 34. The Acostas' source for this statement is the early Washington decision of *Boyer v. Tacoma*, 156 Wash. 280, 286 P. 659 (1930). But the *Boyer* court confirms that a municipality's duties in this context are "measured by the same rule of ordinary care and prudence" as would apply to any other person. *Boyer*, 156 Wash. at 287.

The Acostas' summary judgment presentation foundered on two negligence elements. First, the Acostas provided no summary judgment evidence that the City breached any standard of care. Second, the Acostas produced no summary judgment evidence that the alleged breach by the City of a duty of care was the proximate cause of this blockage.

2. Absence of evidence of breach of municipal duty.

The Acostas were correct in recognizing that expert testimony was necessary to support their case. Generally, "expert testimony is required when an essential element in the case is best established by an opinion that is beyond the expertise of a layperson." *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). "Moreover, to defeat a motion for summary judgment, the expert testimony must be based on facts in the case, not speculation or conjecture." *Seybold*, 105 Wn. App. at 677; *see also Anderson Hay & Grain Co. v. United Dominion Indus., Inc.,* 119 Wn. App. 249, 259, 76 P.3d 1205 (2003) (expert opinion "for summary judgment must be supported by the specific facts underlying the opinion."). Further, "a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate." *Rothweiler v. Clark County*, 108 Wn. App. 91, 100, 29 P.3d 758 (2001).

Ms. Evans' second report identifies five distinct conclusions, but only one (the fourth) makes any reference to how the actions of the City did or did not correlate with the conduct of a reasonably prudent municipality acting under the same or similar circumstances. CP 203. The first three conclusions of Ms. Evans do no more than assert criticism of the City for failing to take action that Ms. Evans believes it "should" consider or that "could have included" various matters. CP 203. The fifth of Ms. Evans' conclusions has no bearing on the City's conduct one

way or another and expresses her view on the credibility of the City's evidence. CP 203.

Ms. Evans' fourth opinion is conclusory and non-specific because it claims the existence of "standard guidelines for maintenance" without providing any supporting information as to what the reference standard consists of or requires. CP 203. Elsewhere in her report, Ms. Evans links this conclusion to a single source, which she identifies as a study by the American Society of Civil Engineers. CP 202. According to Ms. Evans, this reference is to a "fact sheet" which "indicates that 29.9% of the system should be cleaned each year." CP 202. As summary judgment evidence of an essential element of the Acostas' negligence claim, this is deficient for several reasons.

First, the referenced source for Ms. Evans' conclusion was a bare statistic lifted from another document that was not even part of the material presented to the trial court. Ms. Evans asserts her interpretation of this statistic but provides no foundation for its applicability here.

Second, the statement offered by Ms. Evans is not expressed as a standard of care for municipalities in the same or similar circumstances as that present in this case. As a "fact sheet" Ms. Evans left unaddressed how this statement has any meaning in the context of municipal standard of care.

Third, even if the statement is accepted as bearing on the standard of care, it does no more than identify that a certain percentage of a "system" requires "clean[ing]." CP 202. This bare assertion, taken at face value, indicates that the standard of care would be met by any municipality that had performed some fashion of "system" cleaning of approximately one-third of its "system" per year in a given three-year period.

What Ms. Evans implied with her statement was that failure to clean the specific sewer line in front of the Acosta residence within the year preceding the backup was the operative negligence in this case. Even in her own telling the "fact sheet" says no such thing. Suppose that the City had cleaned one-third of its system per year on a basis progressing throughout the entire system over the course of three years. Mr. Trujillo agreed that the City was cleaning the "whole town" at least once yearly until Mayor Martinez took office. CP 297. The Mayor began his term on November 26, 2013. CP 82. The backup occurred on January 12, 2015. CP 414. If the Acostas are granted the inference that 29.9% of the City's sewer system had to be cleaned annually to meet the standard of care, it is invalid to conclude that there was any breach of this duty even if the Acosta's portion of the town had not been cleaned in the previous two years.

This matter was probed in the deposition of Ms. Evans. In her testimony she tied her understanding of the applicable standard of care to specifically the 29.9% figure. CP 74. When pressed, she acknowledged that this statement was merely a reference to an average and retracted her earlier testimony by alluding to "a number of [other] documents," which she could not cite. CP 74.

The difficulty for Ms. Evans grew when Mr. Peacock explained in his declaration that the statement was indeed no more than an average of non-specified cleaning activity of various municipalities that responded to a survey. CP 114. This point by Mr. Peacock was never answered in any summary judgment response material of the Acostas. As clarified by Mr. Peacock, the testimony of Ms. Evans is valueless as a statement of standard of care. Although Ms. Evans made an attempt to seize upon a raw statistic as valid information, this is precisely the kind of material that a trial court may – and should – pierce on summary judgment.

The basis for Ms. Evans' opinion was a recitation of a survey response. It is unknown what municipalities responded to the survey, what they were asked, how their responses were compiled, or for what purpose the survey was conducted. The survey methodology, its sampling protocol, its data collection techniques, and even its basic

conclusions are all left to the imagination. Ms. Evans' conclusory statement was never rehabilitated in the Acostas' summary judgment response materials. *Volk v. Demeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016) (conclusory statements will not preclude summary judgment).

The opinion of Ms. Evans is also unavailing because even Mr. Trujillo – upon whom the Acostas rely for the factual claim that the City had neglected its maintenance duties – recognized that jet-rodding had taken place in the City's sewer system in the year or two prior to the incident. CP 301, 317, 321-322. As shown above, Mr. Trujillo's testimony does not conflict with the figure stated by Ms. Evans as the standard of care. CP 328.

Ms. Evans evasively addressed the issue of standard of care in this case because, as an industrial hygienist, she had no other grounds on which to substantiate her opinion. A stray data point from a survey response does not suffice. The Acostas provided no more than a scintilla of evidence of negligence because the City *did* perform jet-rodding of its system within the year or two preceding the incident. Summary judgment evidence that is only a "scintilla" or that is "merely colorable" will not defeat the motion. *Seiber*, 136 Wn. App. at 736.

3. Absence of evidence of causation.

A second failure of summary judgment evidence supports the trial court's decision in this case. Neither Ms. Evans nor any other witness could identify a causal relationship between the conduct of the City and the blockage. The analytical gaps in causation were exposed by the declaration of Mr. Peacock. On this point the Acostas fell back upon the supposition that the blockage would have been detected and resolved by a heightened degree of City maintenance activity. No evidence supports this view in relation to the factual record of how the blockage occurred.

Proximate cause is an essential element of the Acostas' negligence claim. *Simmons*, 2017 WL 2778190 at *5. Issues of causation are generally not susceptible to summary judgment. However, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." *Ruff v. King County*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995) (internal citations omitted). "Proximate cause is composed of two distinct elements: (1) cause in fact and (2) legal causation." *Fabrique v. Choice Hotels Int'l., Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). "Legal cause generally is a question for the court." *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004). Washington courts will uphold summary judgment where

a plaintiff fails to provide evidence from which cause in fact may be inferred. *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010).

Conflicting evidence of causation should be resolved in favor of a non-movant on summary judgment, but courts will scrutinize causation for analytical gaps, faulty logic, and conjecture. When causation testimony is fallacious, courts will decide proximate cause as a matter of law because under such circumstances reasonable minds could not differ on the issue. *Cho v. City of Seattle*, 185 Wn. App. 10, 16, 341 P.3d 309 (2014). Rigor in evaluating evidence of causation is particularly necessary where causation cannot be determined by a layperson and expert testimony is required. In such situations, " . . . when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." *Moore*, 158 Wn. App. at 155.

When the logic of a causation opinion is revealed to rely on only speculation or conjecture it should be barred. Courts have restated this rule as requiring that causation be expressed in terms more positive than "might have" "could have" or "possibly" when describing the link between an event and a subsequent occurrence. *Fabrique*, 144 Wn. App. at 687. The necessary degree of certainty is customarily expressed as "more likely than not." *Id.*

This standard is not met where a purported breach of duty only might have caused injury. *Moore*, 158 Wn. App. at 150. This is because the existence of "two or more conjectural theories renders equally plausible both negligent and non-negligent explanations." *Id.* at 154, n. 54. Speculation as to what a municipality should have done to prevent an incident does not establish causation. *See Cho*, 185 Wn. App. at 21.

Ms. Evans' report does not purport to establish a causal relationship between any City negligence and the backup event. CP 203. The abstruse statements of Ms. Evans regarding what the City "should have considered" stop short of linking any of these matters to the particular blockage that occurred on January 12, 2015. This is no less true with respect to Ms. Evans' conclusion relating to the "standard guidelines for maintenance" because Ms. Evans simply does not state any causal link between this contention and any consequence for the occurrence of the backup. CP 203.

The conclusions provided in the report of Ms. Evans are the only source of more-probable-than-not evidence of causation. The trial court was correct in the observation that "plaintiff's expert addresses causation obliquely." CP 815. The trial court stated that "the expert, however, does not complete her analysis by offering an opinion as to the cause.

Again, posing reasonable rhetorical questions is not an expert opinion that can be relied on." CP 815.

Ms. Evans' deposition testimony is devoid of any opinion on causation based on a more-probable-than-not basis.[3] Her testimony indicated that grease was "at the very least" a cause of the backup. CP 257. When asked to explain the basis for this view, she cited the deposition testimony of other City witnesses. CP 257. She then acknowledged that "there was quite a number of factors." CP 257. Her list of other contributing factors included sizing and design of the sewer but, here again, when asked if this was the cause of the backup, Ms. Evans answered that "it is not one event but a series of contributing factors." CP 258-259. This listing of factors by Ms. Evans extended to contentions regarding downstream junctions in the sewer line, the lack of jetting on "a regular basis," issues of system capacity, and other miscellaneous concerns that Ms. Evans stated were detailed in her report. CP 261-262. Her deposition testimony finds no support in her report because the report is also devoid of statements of standard of care causally related to the Acostas' harm.

[3] The Acostas' opening brief scarcely mentions Ms. Evans' report. This is possibly because its conclusions are glaringly incomplete, but it may also have to do with the improper authentication of the report, as discussed below in relation to the City's motion to strike. At least the report's conclusions were offered on the correct more-probable-than-not-basis, which cannot be said for the Evans deposition testimony.

When specifically asked whether she knew whether regular jetting of the lines would have prevented this backup, Ms. Evans could only provide the garbled non-responsive answer that:

> I know that it is part of the civil engineering recommendations of how – standards and guidelines of how systems are supposed to be maintained, you know, and those are based on what are the good practices of keeping the risks low relative to having backups occur.

CP 262.

This line of questioning culminated with the following exchange:

Q: Okay. Were any of those items that you've articulated, the grease, the sizing and design of the sewer line including the diameter, the presence of the downstream connections, the lack of jetting, the capacity of the system, the history of backups, were any of these factors sufficient in and of themselves? That is to say, independent of the other factors, to cause the backup?

A: I'm not sure that I could state it that way.

Q: How would you state it?

A: That there was a change in the system in the last couple years that made a dramatic difference between the likelihood that things were going to back up.

Q: What change in the system was that?

A: The lack of regular maintenance or regular jetting.

CP 261.

Ms. Evans implied that her opinion of causation and municipal negligence was built on a premise of insufficient maintenance. But she did not support this view with any statement of the causal relationship

between maintenance and backups. To reiterate, the most she could state was that she "knew" that "regular jetting of the lines" "is part of the civil engineering recommendations of how – standards and guidelines of how systems are supposed to be maintained…." CP 262.

This is not a case where the Acostas may rely on a substitute theory to support the lack of causation evidence. For instance, there is no basis for imposing alternate liability, because the City has not been shown to necessarily be one of the tortfeasors who negligently caused the harm. The City's alleged failure to clean 29.9% of the system per year is not evidence of "a cause which, in a direct sequence, unbroken by any superseding cause, produced the injury complained of and without which such injury would not have happened." *See* WPI 15.01. The "substantial factor" test is inapplicable because this is an ordinary negligence action. *See Fabrique*, 144 Wn. App. at 685 (substantial factor test applicable to cases involving employment, securities, toxic torts, and some forms of medical malpractice). This is also not a case of multiple concurring proximate causes. The initial key point raised by the City was that the Acostas provided no evidence that the City's actions produced the injury. Secondarily, the Acostas failed to address the effect of the ball in causing the injury. But because the Acostas' evidence failed on the first point, there was no basis to hold the City negligent at

all, and concurrent negligence due to multiple proximate causes is inapplicable.

The Acostas' reliance on the "29.9%" figure is similar to Ms. Evans' claim that a much larger sewer pipe would have passed the ball easily. Both claims imply a spurious line of causation because both suggest that later effects might not have happened if different steps had been taken earlier but there is no link between a specific act of claimed negligence and the resulting harm. Where the most a plaintiff can show is that an accident might have been avoided if alternative prior actions had been undertaken, there is no "but for" causation. The relevant negligence inquiry required that the Acostas show that but for the City's breach of a specific applicable standard of care, this blockage would not have occurred. No summary judgment evidence speaks to this.

The trial court had no evidence of causation. Ms. Evans had ample opportunity to establish this connection but was unwilling or unable to do so.

4. Causation opinions that disregard facts are unsound.

Part of the problem for Ms. Evans is that her opinions were so vaguely stated as to resist analysis at all. But, in addition, Ms. Evans could only offer the opinions she did by disregarding facts relating to the presence of a ball blocking the sewer line.

A competent expert opinion must account for the factual record. Where an "expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible." *Volk*, 187 Wn.2d at 278. Ms. Evans did not explain how the implementation of a cleaning regimen of 29.9% of the system per year, even if required by any standard of care, would have any causal significance in avoiding a blockage when the blockage was associated with a ball that could have been inserted into the system at any time.[4]

Ms. Evans recognized that witnesses observed a ball emerging from the manhole downstream from the blockage immediately after the blockage had been cleared, but she dismissed this as having no relationship to her opinion because she deemed it implausible. CP 203. She stated that the testimony of eyewitnesses lacked credibility. CP 267. Ms. Evans skirted the problem of having to account for the ball in her formulation of a causation opinion. This was an invalid mode of

[4] The Acostas repeatedly claim that "no city employee saw a ball blocking the line" but this statement is either false or quite misleading. Br. at 3, 16, 31. It is false that no City employee saw a ball immediately after the blockage was cleared. Three witnesses testified to this. CP 85, 133, 358. A fourth witness, Mr. Trujillo, could not recall what he saw: "Q. Did you see a ball? A. There is many other stuff. I mean, I'm pretty sure there has been balls, cell phones and, I mean, there is a lot of stuff you can find in there." CP 303. It is misleading to argue that they did not see the "ball blocking the line" because there was no way to observe the ball *in situ*. In this limited sense, no one saw the blockage.

reasoning and was not a proper application of expert opinion to a causation problem.

5. The trial court properly granted summary judgment because of the defects in the opinion of Ms. Evans and the absence of any other evidence on essential elements of negligence.

In summary, Ms. Evans did not account for a causally significant connection between municipal negligence and the backup event. She avoided inconvenience from the established factual record by reliance on a selective view of credibility of other witnesses.

This use of an expert opinion is indistinguishable from pure advocacy and is not the form of fact-based expert methodology that is helpful to a jury or that avoids manipulative reliance upon conjecture and speculation. The trial court was correct to grant summary judgment.

D. The sewer backup theory of the Acostas never accounted for Mr. Peacock's explanation of the reason the backup occurred independent of any municipal negligence.

Cases of sewer backups undoubtedly present causation problems. The difficulty faced by the Acostas in this case is not new. There may often be little direct evidence of municipal negligence in the construction or maintenance of a sewer system. But the compelling deficiency in the Acostas' summary judgment presentation was the failure to deal with evidence that acts of third parties were the proximate cause of the flooding of their basement. This evidence rendered it essential for Ms.

Evans to rule out the role of the ball. She could do so only by employing an improper credibility assessment. She could not show how a reasonable degree of municipal care in inspecting and maintaining the sewer lines would have identified the ball before the blockage arose.

Mr. Peacock, for his part, explained how the introduction of the ball into the system would have been apt to result in the blockage in a very short time period. CP 110. He further explained the mechanism of how the ball would have interacted with a sewer line maintained in accordance with the ordinary standard of care and yet nevertheless produced this backup. CP 111. Mr. Peacock explained how even an extraordinarily diligent program of maintenance could not have "anticipated or prevented the obstruction and backup in this case." CP 111. "Even weekly hydro-jetting of the entire system – which is a practice unheard of for any municipality of which I am aware – would have been insufficient to detect and resolve this blockage prior to the backup and flooding that occurred." CP 111.

No evidence suggests that the failure to maintain the system within the time period stated by Ms. Evans caused the flooding. The Acostas did not offer evidence conflicting with the declaration of Mr. Peacock, without which a jury could not fairly analyze causation but would instead be encouraged to speculate. Where the non-movant fails

to submit a response setting forth information to address proximate cause issues raised by the movant, summary judgment is proper. *Fabrique*, 144 Wn. App. at 688.

There was no evidence of negligence of the City in maintenance of the sewer system because Ms. Evans did not identify a failure to adhere to any standard of care. But even if there was a peppercorn of evidence of negligence, the opinions of Ms. Evans did not account for how that negligence was a probable cause of the flooding. She offered no opinion that the ball would have passed through the sewer line unimpeded if the City had conducted whatever maintenance she believes was required. There was no evidence that the City negligently failed to inspect the sewer lines in the interim between the ball being inserted into the system and the resulting blockage. Mr. Peacock stated that the ball would have resulted in a sudden backup event. Nothing from Ms. Evans contradicts him. It is impossible to determine the efficacy of any reasonable inspection routine in disclosing the obstruction. The matter is left fraught with conjecture.

The Acostas attempt to buttress this defect with the vague testimony of Mr. Mendoza that the backup had "been going on a while." Br. 15, citing CP 351. Mr. Mendoza's "while" is utterly ambiguous. The backup took many hours to clear, but this says nothing about the

length of time that the obstruction was amenable to detection before the backup began. CP 4. Again, the problem for the Acostas returns to their failure to actually respond to Mr. Peacock. Under these circumstances, the burden shifting purpose of CR 56(e) worked properly.

Illustrative cases of the interplay between negligence, causation, and sewer backups can be found.

A recent case from Texas is similar. A men's clothing store was flooded with raw sewage that the plaintiff claimed was proximately caused by a gradual accumulation of debris including grease. *Jos. A. Bank Clothiers, Inc. v. Cazzola Plumbing, Inc.*, No. 03-04-00198-CV, 2005 WL 1363995 (Tex. Ct. App. 2005).[5] The plaintiff's case was supported by an affidavit of its expert opining that failure to clean the relevant section of sewer line was the proximate cause of the flooding, but the trial court found this insufficient and dismissed the case. *Jos. A. Bank*, 2005 WL 1363995 at *3. The appellate court affirmed because the expert's opinion "never bridged the 'analytical gap' between the evidence and his opinion." *Id.* at *5. The appellate court observed that "the expert hypothesizes that [defendants'] failure to hydro-jet the sewer line caused the build-up of dirt and grease, but offered no evidence that this was what actually happened." *Id.*

[5] Unpublished opinion cited pursuant to GR 14.1(b) and Tex. R. App. P. 47.7(b).

Another case in accord is *Maciejko v. Lunenberg Fire Dist. No. 2*, 171 Vt. 542, 758 A.2d 811 (2000). In *Maciejko*, a segment of sewer line that had previously backed up appeared to cause a new flooding event. The municipality had no maintenance plan or policy. *Maciejko*, 171 Vt. at 542. A judgment for plaintiff was reversed because no evidence of proximate cause related the obstruction to the lack of regular maintenance. *Id.* at 543.

Washington is represented in this line of authority by *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615 (1985). In *Nejin*, inspections of the relevant sewer line had been ignored for many years and the city was therefore deemed to be negligent. *Nejin*, 40 Wn. App. at 419. Nevertheless, the trial court's judgment for plaintiff was reversed on appeal because of the absence of evidence of proximate cause. *Id.* at 420. The circumstantial evidence of causation encompassed alternative theories, "under one of which a defendant would be liable and under the other of which there would be no liability . . . ." *Id.* at 420 (internal quotations omitted). In *Nejin*, as here, "in matters of proof the existence of facts may not be inferred from mere possibilities." *Id.* at 421.

E. The trial court erred in denying the City's motion to strike the opinion of Ms. Evans.

The City moved to strike the expert reports and testimony of Ms. Evans. CP 728-729. The City's motion was based on three grounds.

First, Ms. Evans' reports were unsworn and did not constitute admissible summary judgment evidence pursuant to CR 56(e). Second, the City argued that Ms. Evans lacked any qualifications to opine on matters relating to a municipal wastewater system. Third, Ms. Evans' opinions were incompetent because she relied on no methodology to justify her ultimate conclusion on negligence but instead improperly based this conclusion on her of the credibility of other witnesses. *See* CP 737-747.

Because this Court has the same task as the trial court in determining whether summary judgment was proper, the City may renew its challenge to the foundations of Ms. Evans' opinion. A "successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court . . . ." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202, 11 P.3d 762 (2000).

1. Ms. Evans' reports are inadmissible summary judgment evidence.

Summary judgment evidence that is unauthenticated or that is hearsay is not competent. *See Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 327, 300 P.3d 431 (2013) (letters opining on deficiencies in care did not constitute summary judgment evidence because not made in the form of sworn affidavit or declaration); *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 142, 331 P.3d 40 (2014) (expert valuation report

submitted in conjunction with affidavit of counsel, but not affidavit of the expert, was deemed unauthenticated and inadmissible).

The reports of Ms. Evans were appended only to a declaration of counsel. CP 154-155. The absence of authentication by Ms. Evans might nevertheless be overlooked if the reports were sworn under penalty of perjury. But they were not. They should not be considered on summary judgment. CR 56(e).

2. Ms. Evans' opinions are not based on any methodology but are instead based on the selective endorsement of testimony from other witnesses.

An expert's opinion must be helpful to the trier of fact. ER 702. This test is not met where an expert witness merely repeats testimony of a fact witness because this lacks any scientific basis and improperly uses the expert's credentials to bolster the credibility of another witness. *See State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

Ms. Evans offers the opinion that testimony of other city witnesses regarding the presence of a ball in the sewer line was "implausible." CP 203. The presence of the ball was observed by the Mayor, Michael Mendoza, and Erik Van Doren. CP 85, 133, 348. A fourth witness, Mr. Trujillo, could not testify one way or another as to whether he had observed the ball. CP 303.

Ms. Evans' opinion in this case was reached only by her disregard of evidence inconsistent with her theory of negligent maintenance. Ms. Evans manipulated the facts to fit her theory when she opined that there was no ball and disregarded contrary evidence as lacking credibility. Given the ambiguity in the testimony of Mr. Trujillo, not one fact witness supports Ms. Evans' opinion as to the absence of a ball.

The selective endorsement of testimony by Ms. Evans fails to cure the analytical gap in her opinion, as argued above at section IV(C). This error on Ms. Evans' part renders her testimony inadmissible on a foundational level.

V. CONCLUSION

For the forgoing reasons, the trial court's summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of August, 2017.

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By: _____

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City of Mabton

DECLARATION OF SERVICE

On the day set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Motion for Extension of Time in Court of Appeals Cause No. 351599 to the following parties:

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Electronic filing by JIS Portal to:

Clerk of the Court
Court of Appeals, Division III
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Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED THIS 23rd day of August, 2017, at Yakima, Washington.

Julie Kihn

MENKE JACKSON BEYER, LLP

August 23, 2017 - 11:25 AM

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